

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:BOS:TL-N-1656-01
PColleran

date:

to: Rosemary Piper
Team Manager, Team 1327
LMSB:CTM

from: Associate Area Counsel
(Financial Services: Boston)

subject:

[REDACTED]
EIN [REDACTED]
UIL 6501.08-17
Consent to Extend the Period of Limitations
Taxable Year Ended: December 31, [REDACTED]
Earliest Expiration of Statute of Limitations: [REDACTED]

This memorandum responds to your request for assistance dated March 9, 2001 requesting guidance on extending the statute of limitations on assessment with respect to [REDACTED] for its taxable year ended [REDACTED]. This memorandum should not be cited as precedent.

ISSUES

1. Whether the Form 872-S, Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation, for [REDACTED] taxable year ended December 31, [REDACTED] executed by [REDACTED], as Tax Matters Person on [REDACTED] is valid?

2. Who is the proper party to execute Form 872-S, Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation for [REDACTED] taxable year ended December 31, [REDACTED]?

CONCLUSION

1. The Form 872-S, Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation, for [REDACTED] taxable year ended December 31, [REDACTED] executed by [REDACTED], as Tax Matters Person on [REDACTED] is valid.

2. [REDACTED] is the proper party to execute Form 872-S, Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation, for [REDACTED] taxable year ended December 31, [REDACTED].

FACTS

[REDACTED] ([REDACTED]) was incorporated in the Commonwealth of Massachusetts on [REDACTED]. On [REDACTED] [REDACTED] elected under I.R.C. §1362(a) to be an S corporation by filing Form 2553. Pursuant to this election [REDACTED] filed a Form 1120S, U.S. Income Tax Return for an S Corporation, for its taxable year ended December 31, [REDACTED]. On the second page of its Form 1120S for its taxable year ended December 31, [REDACTED], [REDACTED] designated [REDACTED] as its Tax Matters Person (TMP). [REDACTED] held an [REDACTED] percent ownership in [REDACTED] and was also [REDACTED]'s Chief Financial Officer during the year at issue. [REDACTED] also signed [REDACTED]'s Form 1120S for its taxable year ended December 31, [REDACTED].

You are presently examining [REDACTED] for its tax year ended December 31, [REDACTED]. In the course of your examination you secured Form 872-S Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation, extending the period to assess the amount of any tax with respect to all shareholders attributable to any subchapter S items to [REDACTED]. The Form 872-S was signed on behalf of [REDACTED] by [REDACTED], Tax Matters Person on [REDACTED] and on behalf of the Internal Revenue Service by Cathleen C. Grant, Group Manager on [REDACTED].

On [REDACTED], [REDACTED] through its wholly owned Delaware limited liability company, [REDACTED] acquired [REDACTED] percent of the stock of [REDACTED]. [REDACTED] was merged with and into [REDACTED] and the separate existence of [REDACTED] ceased. [REDACTED] was the successor or surviving corporation in the merger. The separate corporate existence of [REDACTED] with all its rights, privileges, immunities, powers and franchises continued unaffected by the merger. After the merger [REDACTED] filed as part of the [REDACTED] consolidated group.

On [REDACTED], [REDACTED], a French Holding Company through its wholly owned subsidiary, [REDACTED] acquired [REDACTED] percent of the common stock of [REDACTED]. [REDACTED] merged with and into [REDACTED] with [REDACTED] surviving as a subsidiary of [REDACTED].

After the acquisition of [REDACTED] by [REDACTED], [REDACTED] changed its name to [REDACTED], retaining employer identification number [REDACTED]. [REDACTED] remains in existence to this day operating as a C corporation.

LAW AND ANALYSIS

I.R.C. §§ 6241 and 6244 provided S corporations with corporate tax years beginning after September 3, 1982 and before January 1, 1997 were subject the unified audit rules enacted as a part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).¹ Accordingly, [REDACTED] for its taxable year ended December 31, [REDACTED] is subject to the TEFRA procedures.

I.R.C. § 6229(a) provided that the period for assessing any tax attributable to such chapter S items or affected items with respect to any shareholder did not expire before the date which is three years after the date which the S corporation's return was filed or due, whichever was later.

I.R.C. § 6231(a)(7) provides that the "tax matters partner" (TMP) of a partnership is the general partner designated as the TMP by the partnership in accordance with the regulations.

Treas. Reg. § 301.6231(a)(7)-1 sets forth the rules for designating a TMP. In order to be designated the TMP the person must have been a general partner at some time during the taxable year for which the designation is made or is a general partner at the time the designation is made. The partnership can designate a TMP on the partnership return.

Due to differences between S corporations and partnerships, certain situations require modification of the TEFRA partnership provisions. Gold-N-Travel, Inc. v. Commissioner, 93 T.C. 618 (1989). In Gold-N-Travel, the court held that a shareholder in the S corporation shall be treated as the equivalent of a general partner for purposes of eligibility as a "Tax Matters Person" for the S corporation.

The Service had in place a procedure for S corporations to designate a Tax Matters Person on the corporate return - Form 1120S (U.S. Income Tax Return for an S Corporation). The instructions to Form 1120S provided that the S corporation may designate an individual shareholder as the Tax Matters Person by

¹ § 1307(c)(1) of the 1996 Small Business Act (P.L. 104-188) repealed the S corporation rules of I.R.C. §§ 6241 through 6245.

completing the Designation of Tax Matters Person section on page 2 of the return. Since the return may be signed by the president, vice president, treasurer, assistant treasurer, chief accounting officer, or any other corporate officer (such as a tax officer), the effect is to allow these individuals to designate a Tax Matters Person.

The period of limitations under I.R.C. § 6229(a) may be extended if the TMP enters into a timely extension agreement with the Internal Revenue Service. I.R.C. § 6229(b)(1)(B). Form 872-S, Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation, is the consent form to extend the assessment period for tax attributable to subchapter S items. See, I.R.C. §§ 6229 and 6244.

A TMP designation remains in effect until: the death of the designated TMP; the TMP is declared legally incompetent; the TMP is liquidated or dissolved (if an entity); the TMP's partnership items become nonpartnership items under I.R.C. § 6231(c) (relating to special enforcement areas); the designation of a new TMP; the resignation by the TMP; or the revocation of the designation by the partnership. Treas. Reg. § 301.6231(a)(7)-1(1).

Based on the facts as represented, and in the absence of a terminating event listed in regulations cited above, [REDACTED] was the Tax Matters Person for [REDACTED] for its taxable year ended December 31, [REDACTED] when he executed the Form 872-S on [REDACTED] based on the designation on the corporate return. The changes in [REDACTED]'s stock ownership are not terminating events under the regulations. Thus, [REDACTED] remains as Tax Matters Person. Accordingly, [REDACTED] is the proper party to execute the Form 872-S on behalf of [REDACTED] formerly known as [REDACTED]. The Form 872-S should state the taxpayer's name as [REDACTED] (formerly known as [REDACTED] EIN [REDACTED]).

To protect against an unforeseen termination of [REDACTED] as Tax Matters Person prior to issuance of a Final S Corporation Administrative Adjustment (FSAA), however, you should follow your normal practice of issuing duplicate generic Tax Matters Person notices to both the S corporation address as reflected on the respective S corporation returns, and to the updated corporate address. These notices should be issued in addition to notices addressed directly to [REDACTED] as Tax Matters Person at his own addresses (both as reflected on the his return and as updated), and to the address of the S corporation.

I.R.C. § 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right: 1) to refuse to extend the period of limitations; or 2) to limit such extension to particular issues; or 3) to limit the extension to a particular period of time. This notice must be provided each time an extension is requested. The legislative history of this provision states that Congress believed that taxpayers should be fully informed of their rights with respect to the statute of limitations on assessment. Congress expressed concern that in some cases taxpayers were not fully aware of their rights to refuse to extend the statute of limitations, and have felt that they had no choice but to agree to extend the statute of limitations upon the request of the Service. See H.R. Conf. Rep. No. 105-599 at 286 (1998).

As part of RRA 98 training, Service personnel were instructed that I.R.C. § 6501(c)(4)(B) can be satisfied by informing taxpayers, either orally or in writing, of their right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame. Service personnel were advised to secure consents to extend statutes of limitations by sending Letter 907(DO) (Rev. 2-2000) or Letter 907(SC) (Rev. 12-1999). See IRM 4541.1 and IRM 121.2.22.3. Service personnel were advised they could provide the taxpayer with a copy of Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999), each time a statute extension was requested, but the best practice would be to advise taxpayers of their rights by sending Letter 907(DO) (Rev. 2-2000), Letter 907(SC) (Rev. 12-1999), or Letter 967 (Rev. 12-1999). (See IRS RRA 98 National Resource Center Question 203.) Service personnel were instructed to document their actions.

If we can be of further assistance please contact the attorney assigned to this matter, Paul Colleran at (617)565-7838.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

DAVID BRODSKY
Associate Area Counsel
(Large and Mid-Size Business)

By: _____
PAUL COLLERAN
Attorney (LMSB)